IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BROTECH CORPORATION and PUROLITE INTERNATIONAL, LTD.	:	CIVIL ACTION
v.	:	
WHITE EAGLE INTERNATIONAL TECHNOLOGIES GROUP, INC., ET AL.	:	NO. 03-232

MEMORANDUM

Padova, J. **November 18, 2003**

Before the Court is Plaintiffs Brotech Corporation's and Purolite International, Ltd.'s Motion to Dismiss Defendant RenalTech International, LLC's Counterclaim. For the reasons that follow, the Motion is granted and the Counterclaim is dismissed in its entirety, without prejudice.

I. BACKGROUND

Plaintiffs have brought this action to correct the name of the inventor on patents relating to inventions of certain Russian scientists and for equitable title to those patents, misappropriation of trade secrets, tortious interference with contract and other common law claims arising from Defendants' alleged interference with the relationship between Plaintiffs and those Russian scientists. The Amended Complaint alleges that, for the last ten years, Plaintiffs' employees have engaged in a cooperative research and development program with several Russian scientists led by Professor Vadim A. Davankov of the Russian Academy of Science. (Am. Compl. ¶ 2.) As a result of that

research, Plaintiffs' employees and the Russian scientists have developed unique macronet and micronet copolymer resins for a variety of adsorpitve uses and methods to produce these resins in a commercially viable manner, including their use in renal dialysis. (Am. Compl. ¶ 4.) The Amended Complaint further alleges that Defendants procured eleven United States patents on these inventions, misrepresenting their ownership and failing to acknowledge Plaintiffs' property rights. (Am. Compl. ¶ 73-74.) The disputed patents are: U.S. Patent 5,773,384 issued June 30, 1998; U.S. Patent 5,904,663 issued May 18, 1999; U.S. Patent 6,087,300 issued July 11, 2000; U.S. Patent 6,114,466 issued September 5, 2000; U.S. Patent 6,127,311 issued October 3, 2000; U.S. Patent 6,133,393 issued October 17, 2000; U.S. Patent 6,136,424 issued October 24, 2000; U.S. Patent 6,153,707 issued November 28, 2000; U.S. Patent 6,156,851 issued December 5, 2000; U.S. Patent 6,159,377 issued December 12, 2000; U.S. Patent 6,303,702 issued October 16, 2001. (Am. Compl. ¶ 74.)

Defendant RenalTech International, LLC ("RenalTech") has asserted counterclaims against both Plaintiffs asserting that Plaintiffs are using their superior economic resources and this litigation to gain control of Defendants' pioneering technology. The Counterclaim alleges that RenalTech is developing new technology to assist chronic renal failure patients by removing middle molecular weight toxins, which are not efficiently removed

by renal dialysis, from the blood. (Countercl. ¶¶ 15-16.) RenalTech's chemists have developed this technology, a biocompatible adsorbent polymer and a device incorporating this polymer, trademarked BetaSorb, which has been designed to be used in conjunction with hemodialysis. (Countercl. ¶ 16.) A human clinical trial of BetaSorb is currently underway in the United States. (Countercl. ¶ 17.) RenalTech is also studying the use of its polymer technology to treat severe sepsis. (Countercl. ¶¶ 23-24.) RenalTech claims to be the only organization currently conducting human clinical trials for such products. (Countercl. ¶ 32.)

The Counterclaim alleges that Plaintiffs have brought this action in order to coerce RenalTech into ceding control of its intellectual property to Plaintiffs so that Plaintiffs can unlawfully monopolize the market for its products. (Countercl. ¶ 33.) The Counterclaim alleges claims against Plaintiffs for attempted monopolization pursuant to Section 2 of the Sherman Act, 15 U.S.C. § 2; conspiracy to restrain trade pursuant to Section 1 of the Sherman Act, 15 U.S.C. § 1; and for tortious interference with existing and prospective business relations. Plaintiffs have moved to dismiss the Counterclaim.

II. LEGAL STANDARD

When determining a Motion to Dismiss pursuant to Rule 12(b)(6), the court must accept as true all well pleaded facts in

the complaint, or counter-claim, and any reasonable inferences derived from those facts, and view them in the light most favorable to the Plaintiff. FTC v. Commonwealth Marketing Group, Inc., 72 F. Supp. 2d 530, 535 (W.D. Pa. 1999) (citations omitted). However, the Court need not accept "bald assertions or legal conclusions." Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). The dismissal standard is higher in antitrust cases than generally. Rolite, Inc. v. Wheelabrator Envir. Systems, Inc., 958 F. Supp. 992, 995 (E.D. Pa. 1997). However, the facts underlying the elements of an antitrust claim must be pled with specificity. Syncsort Incorporated v. Sequential Software, Inc., 50 F. Supp. 2d 318, 328 (D.N.J. 1999) (dismissing antitrust counterclaim brought pursuant to Section 2 of the Sherman Act for failure to allege specific facts setting forth the elements of a claim for monopolization or attempted monopolization); see also Com. of Pennsylvania ex. rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 182 (3d Cir. 1988) ("When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.") (quoting Car Carriers, Inc. v. Ford Motor Co., 734 F.2d 1101, 1106 (7th Cir. 1984)).

III. DISCUSSION

A. The Antitrust Claims

RenalTech's first two claims for relief allege antitrust claims arising from the filing of the instant lawsuit. The Counterclaim alleges that Plaintiffs have brought the instant litigation in "an undisguised effort to coerce RenalTech into ceding control of the core of its intellectual property to BroTech and Purolite International so that they can unlawfully monopolize the market. . . BroTech and Purolite International . . . are seeking to exploit their vastly superior economic resources to pressure RenalTech through the intimidation of this sham lawsuit." (Countercl. ¶ 33.) Plaintiffs have moved to dismiss these claims for relief on the grounds that they are immune from Sherman Act liability based upon the filing of this action pursuant to the Noerr-Pennington doctrine. Plaintiffs also maintain that, if their claim of immunity is denied, RenalTech's Sherman Act claims should be dismissed for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6).

1. The Noerr-Pennington Doctrine

In Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36 (1961), the United States Supreme Court recognized that the Sherman Act does not restrain "attempts to influence the passage or enforcement of laws" and does not "prohibit two or more persons from associating together in an

attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." In United Mine Workers of America v. Pennington, 381 U.S. 657, 670 (1965), the Supreme Court noted that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose." In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the Supreme Court extended the Noerr-Pennington doctrine to the right to access the courts, but noted that the filing of sham litigation would not be immune from suit under the Sherman Act:

> it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.
> We said, however, in Noerr that there may be instances where the alleged conspiracy "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."

Id. at 510-11 (citing Noerr, 365 U.S. at 144). In Professional Real Estate Investors, Inc. v. Columbia Picture Industries, Inc., 508 U.S. 49 (1993), the Supreme Court examined what constitutes sham litigation and determined that anti-competitive intent does not turn a protected lawsuit into a sham proceeding open to attack under the Sherman Act, stating that "an objectively reasonable

effort to litigate cannot be sham regardless of subjective intent." Id. at 56-57. The Supreme Court emphasized that the objective reasonableness of a lawsuit is not affected by the anti-competitive purpose of the litigant. Id. at 59 ("Our decisions therefore establish that the legality of objectively reasonable petitioning 'directed toward obtaining governmental action' is 'not at all affected by any anticompetitive purpose [the actor] may have had.'") (quoting Noerr, 365 U.S. at 140). The Supreme Court also defined sham litigation:

> We now outline a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor," Noerr, supra, 365 U.S., at 144 81 S. Ct., at 533 (emphasis added), through the "use [of] the governmental process--as opposed to the outcome of that process--as an anticompetitive weapon," Omni, 499 U.S., at 380, 111 S. Ct., at 1354 (emphasis in original). This two-tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability. Of course, even a plaintiff who defeats the defendant's claim to Noerr immunity by demonstrating both the objective and the

> subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

Id. at 60-61 (emphasis in original, footnote omitted). The Supreme Court further explained that, if a party had probable cause to file a lawsuit, it is not sham litigation. Id. at 62 ("The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation.")

Plaintiffs argue that, since the Amended Complaint survived Defendants' Motion to Dismiss, they had probable cause to bring this lawsuit and they are immune from antitrust liability pursuant to Professional Real Estate Investors. RenalTech maintains that the denial of Defendants' Motion is not dispositive because, when deciding the Motion to Dismiss, the Court accepted all of the allegations of the Amended Complaint as true. RenalTech contends that the factual allegations underlying Plaintiffs' claims will be found to be objectively baseless and, therefore, will not support the application of Noerr-Pennington immunity. RenalTech further argues that its claims for relief brought pursuant to the Sherman Act allege the elements of "sham" litigation set forth in Professional Real Estate Investors and, therefore, Plaintiffs' Motion to Dismiss its claims for relief pursuant to the Sherman Act should be denied. The Counterclaim alleges that: Plaintiffs' claims in this action are objectively baseless (Countercl. ¶¶ 5,

34); Plaintiffs motivation in filing suit was not to obtain a judgment, but to pressure RenalTech into ceding control of its intellectual property in a coerced settlement (Countercl. ¶¶ 6, 36); Plaintiffs' claims are "an undisguised effort to coerce RenalTech into ceding control of the core of its intellectual property to [Plaintiffs] so that they can unlawfully monopolize the market" (Countercl. ¶ 33); and, this is a sham lawsuit (Countercl. ¶¶ 33, 35). The Court finds that RenalTech has alleged that the instant lawsuit is "sham" litigation pursuant to the definition set forth in Professional Real Estate Investors, 508 U.S. at 60-61. The Court further finds that it cannot determine, on the record of this Motion to Dismiss, that Plaintiffs had probable cause to file the Amended Complaint. Accordingly, Plaintiffs' Motion to Dismiss RenalTech's Sherman Act claims based upon the Noerr-Pennington doctrine is denied.

2. Attempted monopolization

RenalTech's first claim for relief alleges a claim for attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. In order to state a claim for attempted monopolization in violation of Section 2 of the Sherman Act, RenalTech must allege the following elements:

> (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. In order to determine whether there is a dangerous probability of monopolization,

> courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) (citations omitted). Plaintiffs argue that this claim must be dismissed because the Counterclaim does not adequately plead the relevant product market. The United States Court of Appeals for the Third Circuit ("Third Circuit") has recognized that the failure to plead the relevant product market is a sufficient basis for dismissal of an antitrust claim. Queen City Pizza v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997); see also, Syncsort, 50 F. Supp. 2d at 331. The Third Circuit stated the elements of the product market as follows:

> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Id. (quoting Brown Shoe Co. v. U.S., 370 U.S. 294, 325, (1962); Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991)). The Third Circuit noted that the "outer boundaries of a relevant market are determined by reasonable interchangeability of

use," id. at 437 (citations omitted), and defined cross-elasticity as "a measure of the substitutability of products from the point of view of buyers," i.e., the measure of "the responsiveness of the demand for one product to changes in the price of a different product." Id. at 438 n. 6 (citation omitted).

The Counterclaim defines the relevant product market as follows: "hemocompatible or biocompatible polymeric resins designed to remove middle molecular weight compounds or toxins from physiological fluids, including human blood." (Countercl. ¶ 31.) The Court finds that RenalTech has failed to define the relevant product market with reference to the rule of reasonable interchangeability of use or cross-elasticity of demand. The Court further finds that the Counterclaim alleges a proposed market which does not encompass any interchangeable substitute products and does not allege that there are no substitute products. Accordingly, Plaintiffs' Motion to Dismiss RenalTech's claim for relief pursuant to Section 2 of the Sherman Act is granted pursuant to Rule 12(b)(6).

3. Conspiracy to Restrain Trade

RenalTech's second claim for relief alleges a claim for conspiracy to restrain trade pursuant to Section 1 of the Sherman Act, 15 U.S.C. § 1. In order to state a claim under Section 1 of the Sherman Act, the claimant must plead the following elements:

> (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the objects of the conduct pursuant to the concerted action were illegal; and (4) that it was injured as a proximate result of the concerted action.

Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1229 (3d Cir. 1993). Plaintiffs assert four grounds for dismissal of this claim: (1) that the instant action was not brought for an anticompetitive purpose; (2) that, as affiliated corporations, they cannot act in concert for antitrust purposes; (3) that the Counterclaim does not plead the relevant product market; and (4), that the Counterclaim does not allege an antitrust injury.

Plaintiffs argue that their claims for relief are actually pro-competitive, rather than anticompetitive, because they seek to share the patents at issue in this suit with Defendants. (Pls. Mem. at 26.) However, Plaintiffs' argument is belied by the Amended Complaint, which seeks a declaration that Plaintiffs are the exclusive owners of the patents at issue. (Am. Compl. ¶¶ 80-84.) As exclusive ownership of these patents would give Plaintiffs a legal monopoly over the disputed inventions, the Court cannot find, for purposes of this Motion to Dismiss, that Plaintiffs' claims for relief are pro-competitive.

Plaintiffs also argue that, as affiliated corporations, they are so interrelated that their actions are deemed unilateral and not concerted for antitrust purposes. Plaintiffs rely on

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). In Copperweld, the Supreme Court founmd that a corporation and its wholly owned subsidiary could not conspire with each other for purposes of liability under Section 1 of the Sherman Act:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny. . . .
> [I]n reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests.

Id. at 771-72 (emphasis in original). The Third Circuit has recognized that two subsidiaries of the same corporation are similarly incapable of conspiring with each other for the purposes of Section 1. Siegel Transfer, Inc. v. Carrier Exp., Inc., 54 F.3d 1125, 1133 (3d Cir. 1995) (citing Advanced Health-Care Services, Inc. v. Radford Community Hosp., 910 F.2d 139, 146 (4th Cir. 1990)).

The pleadings which comprise the record on this Motion to Dismiss do not, however, describe the corporate relationship between the Plaintiffs sufficiently to allow the Court to determine, at this stage of the litigation, that Plaintiffs are

affiliated corporations incapable of conspiring to violate the antitrust laws. The Amended Complaint does not allege that Plaintiffs are subsidiaries of the same parent corporation. The Amended Complaint describes Plaintiffs as follows:

> 9. Plaintiff BroTech Corporation is a Delaware Corporation that trades under the name "The Purolite Company." It is headquartered at 150 Monument Road, Bala Cynwyd, PA 19004. BroTech is responsible for the exclusive marketing in North America, and elsewhere, of the products of Purolite International, Ltd. It also performs manufacturing operations for Purolite International, Ltd.
>
> 10. Plaintiff Purolite International, Ltd., is a corporation organized under the laws of the United Kingdom. It is headquartered at Cowbridge Road, Pontyclun, Wales, where it develops, manufactures and markets macronet and micronet copolymer resins.

(Am. Compl. ¶¶ 9-10.) The Counterclaim alleges that the "Purolite Company" consists of "at least BroTech and Purolite International," but does not state whether those corporations are wholly, or majority, owned subsidiaries of the Purolite Company. (Countercl. ¶ 12.) Moreover, Plaintiffs took the position, in response to Defendants' Motion to Dismiss the Amended Complaint, that they are not corporate affiliates. (Pls.' Mem. in Opp. to Defs.' Mot. to Dismiss at 7 n. 1.) The Court cannot, therefore, find, on this Motion to Dismiss, that Plaintiffs are incapable of conspiring with each other for purposes of Section 1 of the Sherman Act. Indeed, the doctrine of judicial estoppel may prevent Plaintiffs from

taking the position, in this proceeding, that they are affiliated corporations, since they relied on the fact that they are not affiliated in their response to Defendants' Motion to Dismiss. See Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp., 337 F.3d 314, 319 (3d Cir. 2003) ("'[t]he basic principle of judicial estoppel ... is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.'") (citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3d Cir. 1996)).

Plaintiffs also argue that RenalTech's claim for relief pursuant to Section 1 of the Sherman Act should be denied for failure to allege antitrust injury and for failure to adequately allege the product market. In order to recover damages in an antitrust suit, a private plaintiff must prove the existence of an antitrust injury, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990) (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)). The Third Circuit has recognized that, because the purpose of the antitrust laws is to protect competition, the court must examine "the antitrust injury question from the viewpoint of the consumer. 'An antitrust plaintiff must prove that challenged conduct affected the

prices, quantity or quality of goods or services,' not just his own welfare." Mathews v. Lancaster General Hosp., 87 F.3d 624, 641 (3d Cir. 1996) (quoting Tunis Bros., 952 F.2d at 728). RenalTech alleges that it was injured as follows:

> 37. And although they have not yet succeeded, BroTech's and Purolite International's predatory litigation tactics are having their intended effect. The pendency of the lawsuit has been raised by RenalTech's investors and potential investors, it has diverted management time and attention, it has consumed scarce financial resources, and has been the subject of discussion with RenalTech's major commercial partner, Fresenius. Thus, RenalTech has already been damaged, and is threatened with still greater damage if BroTech and Purolite International are not called to account for their predatory, vexatious conduct.

(Am. Compl. ¶ 37.) The Court finds that the Counterclaim does not allege an antitrust injury. As the Court has also found that the Counterclaim does not sufficiently allege the relevant product market, Plaintiffs' Motion to Dismiss RenalTech's claim for relief pursuant to Section 1 of the Sherman Act is granted pursuant to Rule 12(b)(6).

B. The Tortious Interference Claims

RenalTech's third and fourth claims for relief allege that, by filing the instant lawsuit, Plaintiffs deliberately interfered with RenalTech's current business relations (third claim for relief) and prospective business relations (fourth claim for relief). In order to establish tortious interference with existing contractual, or

business, relations,[1] a claim must allege the following elements:

> (1) existence of contract; (2) purposeful action by the defendant specifically intended to harm the existing relation; (3) absence of privilege or justification on the part of the defendant; and (4) occasioning of actual legal damage as a result of defendant's conduct.

CAT Internet Services Inc. v. Magazines.com, Inc., No.Civ.A. 00-2135, 2001 WL 8858, at *5 n. 1 (E.D. Pa. Jan. 4, 2001). In order to prove intentional interference with prospective contractual, or business, relations, a claim must allege the following elements:

> (1) existence of a prospective contractual relation; (2) purpose or intent by defendant to harm plaintiff by preventing the relationship from occurring; (3) absence of privilege or justification on the part of the

[1]Although RenalTech suggests that New York law might apply to its claims for tortious interference, it states that New York and Pennsylvania law do not differ with respect to these claims. The elements of claims for tortious interference with existing and prospective business relations under Pennsylvania law are identical to the elements of claims for tortious interference with existing and prospective contractual relations, and are based on Sections 766 and 766B of the Restatement (Second) of Torts. See Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 470-71 (Pa. 1979). The elements of claims for tortious interference with existing and prospective business relations under New York law are also based on Sections 766 and 766B of the Restatement (Second) of Torts. See Kunica v. St. Jean Financial, Inc., Civ.A.No. 97 Civ. 3804 (RWS), 1998 WL 437153, at *7 (S.D.N.Y. Aug. 3, 1998); Scutti Enterprises, LLC v. Park Place Entertainment Corp., 322 F.3d 211, 215 (2d Cir. 2003) (noting that, if the business relations at issue do not involve a valid contract, the claim is treated as one falling under Section 766B of the Restatement (Second) of Torts). As the laws of Pennsylvania and New York are the same with respect to these claims, the Court need not engage in a choice of law analysis with regard to this issue. Oil Shipping, B.V. v. Denizcilik, 10 F.3d 1015, 1018 (3d Cir. 1993) (noting that a choice of law analysis is only necessary where an actual conflict between two bodies of law exists.)

> actor (appellee); and (4) the occurrence of actual harm or damage to plaintiff as a result of the actor's conduct.

Id. at *4 (citing Glen v. Point Park College, 441 Pa. 474, 272 A.2d 895, 898 (Pa. 1971)).

Plaintiffs argue that Renaltech's claims for tortious interference with existing and prospective business relations must be dismissed because the filing of the lawsuit in this action was absolutely privileged. Plaintiffs rely on the principle of judicial privilege, which immunizes communications issued in the regular course of judicial proceedings which are "pertinent and material to the redress or relief sought." Post v. Mendel, 507 A.2d 351, 356 (Pa. 1986). However, the Third Circuit has determined that the filing of a lawsuit without probable cause and "for a purpose other than the securing of redress from the court" is not immunized by the judicial privilege. Silver v. Mendel, 894 F.2d 598, 603-05 (3d Cir. 1990) (finding that the Supreme Court of Pennsylvania would conclude that the judicial privilege did not bar a claim for tortious interference with contract based on allegations that "defendants caused an involuntary petition in bankruptcy to be filed without probable cause to believe in the merit of the petition and for a purpose other than the securing of redress from the court."). The Counterclaim alleges that the instant lawsuit is a sham (Countercl. ¶¶ 33, 35); that the claims in this action are objectively baseless (Countercl. ¶¶ 5, 34); and

that Plaintiffs did not file suit for the purpose of obtaining a judgment. (Countercl. ¶¶ 6, 36.) Accepting these allegations as true, the Court cannot find, for purposes of this Motion to Dismiss, that the filing of the instant lawsuit was privileged.

Plaintiffs also argue that RenalTech's claims for tortious interference with existing and prospective business relations should be denied for failure to allege any existing or prospective contract with which Plaintiffs interfered or any actual harm or damage arising from Plaintiffs' conduct. The Pennsylvania courts do not recognize a claim for tortious interference with existing or prospective contractual, or business, relations in which the "interference was directed toward the plaintiff, rather than toward a third party." Allen v. The Washington Hospital, 34 F. Supp. 2d 958, 965 (E.D. Pa. 1999).

The Pennsylvania Courts have adopted Section 766 of the Restatement (Second) of Torts, which sets out the cause of action for tortious interference with existing contractual, or business, relations:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the third person's failure to perform the contract.

Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1388

(3d Cir. 1991) (citing Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 393 A.2d 1175, 1181-83 (Pa. 1978). The Pennsylvania Courts have not, however, adopted Section 766A of the Restatement (Second) of Torts, which addresses interference directed at the plaintiff, rather than at the third party:

> One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Gemini Physical Therapy and Rehabilitation, Inc. v. State Farm Mut. Auto. Ins. Co., 40 F.3d 63, 66 (3d Cir. 1994) (citing Section 766A of the Restatement (Second) of Torts). The Counterclaim does not allege that Plaintiffs' filing of the instant lawsuit caused any third party not to perform an existing contract with RenalTech or that RenalTech lost actual pecuniary benefits from such a contract with a third party. See Shiner v. Moriarty, 706 A.2d 1228, 1238-39 (Pa. Super. Ct. 1998) (recognizing that, to maintain an action for intentional interference with contractual relations, a party must allege "lost pecuniary benefits flowing from the contract itself.") (citing Pelagatti v. Cohen, 536 A.2d 1337, 1343-44 (Pa. Super. Ct. 1987)).[2] The Court finds, accordingly, that the Counterclaim does

[2]The New York courts also require a party claiming tortious interference with business relations to establish pecuniary injury from the loss of its contract with the third party. H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., 879 F.2d

not state a claim for tortious interference with existing business relations upon which relief may be granted.[3]

The tort of tortious interference with prospective contractual, or business, relations is set forth in Section 766B of the Restatement (Second) of Torts:

> [o]ne who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

Restatement (Second) of Torts, § 766B. The Pennsylvania Courts have not adopted Section 766(B)(b). Allen, 34 F. Supp. 2d at 964-65; Leopold Graphics, Inc. v. The CIT Group/Equipment Financing, Inc., No.Civ.A. 01-cv-6028, 2002 WL 1397449, at *5 (E.D. Pa. June 26, 2002). Consequently, there is no cause of action for interference with prospective contractual relations where the interference is directed at the plaintiff, rather than at a third

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1005, 1024 (2d Cir. 1989).

[3]The Court would reach the same result under New York law, as the New York courts also have not adopted Section 766A of the Restatement (Second) of Torts, or suggested that they would be inclined to do so. D'Andrea v. Rafla-Demetrious, 146 F.3d 63, 66 (2d Cir. 1998) (affirming grant of summary judgment to Defendant where plaintiff claimed that "the defendant interfered with performance of the plaintiff's own contractual obligations.") (emphasis in original).

party. Coram Heathcare Corp. v. Aetna U.S. Healthcare, Inc., No.Civ.A. 99-3330, 2000 WL 217750, at *4 (E.D. Pa. Feb. 26, 2000).[4] As the interference alleged in the Counterclaim was directed at RenalTech, rather than at a third party, the Court finds that the Counterclaim does not state a claim for tortious interference with prospective business relations upon which relief may be granted.

IV. CONCLUSION

For the foregoing reasons, the Court finds that the Counterclaim fails to state a claim upon which relief may be granted pursuant to either Section 1 or Section 2 of the Sherman Act or for tortious interference with either existing or prospective business relations. Accordingly, Plaintiffs' Motion to Dismiss is granted without prejudice. An appropriate order follows.

[4]Defendant does not suggest that the New York courts have adopted Section 766B(b) of the Restatement (Second) of Torts. The Court has found no authority holding that the New York courts have adopted this section.

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O R D E R

AND NOW, this 17th day of November, 2003, upon consideration of Plaintiffs' Motion to Dismiss Defendants' Counter-Claims (Docket No. 28), Defendant RenalTech's response thereto, and the argument held in open court on October 2, 2003, **IT IS HEREBY ORDERED** that the Motion is **GRANTED** without prejudice and with leave to file an amended counterclaim within twenty (20) days of the date of this Order.

BY THE COURT:

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John R. Padova, J.